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Case No. 87-658

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1987

W. KENNETH ROSS AND
CAROLE A. ROSS,

Appellants

v.

THE CITY OF ROLLING HILLS ESTATES,
An Incorporated City, THE
PLANNING COMMISSION OF THE CITY
OF ROLLING HILLS ESTATES AND
THE CITY COUNCIL OF THE CITY
OF ROLLING HILLS ESTATES,

Appellees.

ON APPEAL FROM THE

COURT OF APPEAL OF CALIFORNIA

SECOND APPELLATE DISTRICT, DIVISION FOUR

BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL FROM STATE COURT

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EDITOR'S NOTE

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BRIEF IN OPPOSITION TO MOTION TO DISMISS APPEAL

I. APPELLANTS HAVE SUFFICIENTLY AND PROPERLY RAISED A FEDERAL QUESTION

Appellants have argued implicitly and explicitly in every California court that the VPO violates their federal and state constitutional due process rights. Appellants rely heavily upon Pacesetter Homes, Inc. v. Village of Olympia Fields, 244 N.E.2d 369 (App.Ct. Ill. 1968) to underscore their dual constitutional attack on the VPO. That case found a municipal ordinance unconstitutional on both state and federal constitutional grounds. Heavy reliance upon a case involving state and federal constitutional rights resulted in this

Court's finding federal jurisdiction in New York ex rel. Bryant v. Zimmerman (1928) 278 U.S. 63, the holding of which finds authority in Radice v. New York (1924) 264 U.S. 292, 296, 297. Id. at 69.

This court has the sole power to decide whether a federal question has been presented, whether the highest state court has passed upon such federal question and, if such high court has not passed upon same, whether this omission was due solely to the manner of presentation of such federal question, or to other circumstances. Street v. N.Y. (1969) 394 U.S. 576, 581-582.

Appellants will not repeat the many references in the record where the federal question was raised. They are clearly set forth. [Jurisdictional

Statement, pp. 3-4] Appellants will reiterate, however, that only a few months after the two U.S. Supreme Court cases voiding California's practice of refusing to acknowledge a governmental taking through regulation were handed down, appellants extensively briefed and argued this issue to California's highest court. [Jurisdictional Statement, App. G]

Specific authority for this federal question could not have been raised any earlier, and yet it was! Even before this Court ruled in Nollan v. California Coastal Commission (1987) 483 U.S. ____, 97 L.Ed.2d 677, and First English Evangelical Lutheran Church of Glendale v. L.A. County (1987) 483 U.S. ____, 96 L.Ed.2d 250, appellants cited the Nollan case. [Jurisdictional Statement, App.E,

p. 13] Appellants were clearly relying on federal constitutional law before the Court of Appeal.

New York ex rel. Bryant v. Zimmerman presented the question of when and how a federal question must be raised in a state court to qualify for federal review. The standards which should be applied in determining whether to exercise federal jurisdiction were described as follows:

> "No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time."
>
> Id. at 278 U.S. 67.

Respondents' claim of want of proper

presentation in the state court is incorrect. The California Supreme Court denied appellants' petition for review for reasons other than any alleged want of presentation. [Jurisdictional Statement, App. H] Since Agins v. City of Tiburon (1979) 24 Cal.3d 266, aff'd. on other grounds (1980) 447 U.S. 225, overruled in First English, supra, no California court would permit recovery on the federal taking issue appellants have raised. California had set up an insurmountable barrier to raising the instant federal question, yet appellants raised it both before and after this Court ruled that Agins was in violation of the federal constitution.

Eddings v. Oklahoma (1982) 455 U.S. 104, lends further support to a finding of federal jurisdiction. In Eddings, a

youth seeking reversal of a state court murder conviction and death penalty sentence failed to raise the necessary federal question in his state court appeal. The state criminal appellate court also failed to mention the relevant federal authority in affirming the conviction. Id. at 114. This Court found federal jurisdiction by ruling that the Oklahoma Court's failure to follow federal law mandated federal review. Quoting New York ex rel. Bryant v. Zimmerman, "Our jurisdiction does not depend on citation to book and verse." Id.

In this case, if Nollan and First English stand for the proposition that the law stated therein has always been the law of this country, the California courts committed the same violation of

their duties to uphold such law as did the Oklahoma courts in Eddings. Such error justifies this Court in finding federal jurisdiction.

II. APPELLANTS' FEDERAL QUESTION CLAIMS WERE PROPERLY AND TIMELY RAISED UNDER CALIFORNIA LAW

In Meier v. Ross General Hospital (1968) 69 Cal.2d. 420, the California Supreme Court stated:

> The Court of Appeal declined to consider this determinative issue on appeal because the plaintiffs, having failed to raise the point in their opening brief, could not do so later without "good reason." [citations omitted] During the course of this litigation the case of Vistica

v. Presbyerian Hospital, supra, 67 Cal.2d 465, proceeded through the courts. On October 10, 1967, three and one-half months after the plaintiffs had filed their closing brief, the Supreme Court decided Vistica; that decision decisively affected the proper disposition of the present case. Thereafter plaintiffs sought and obtained permission to file a supplemental brief and defendants responded by letter.

The circumstances outlined above provide a satisfactory basis for the unusual practice of considering a point raised for the first time after the

opening briefs have been filed.

Id. at 423-24, n.1

To the same effect is California Nat. Supply Co. v. O'Brien (1921) 51 Cal.App. 606, 612, wherein the challenged late-raised issues were adjudged sufficient and timely based on the fact that a new case came down after the opening briefs were submitted.

Appellants met the duties required of them by California law to preserve the federal question on appeal. All authorities cited by respondents to the contrary are inapposite because this case is unique due to the rulings in Nollan and First English. Fairness demands that appellants be given the treatment on this motion that New York ex rel. Bryant v. Zimmerman and Eddings require.

III. CONCLUSION

For the reasons advanced herein, federal jurisdiction should be found by this Court and respondents' motion to dismiss should be denied.

Dated: December 2, 1987

Respectfully submitted,

WEISMAN, BUTLER & WATSON
LAURIE J. BUTLER

By Laurie J. Butler
Laurie J. Butler,
Attorneys for
Appellants

PROOF OF SERVICE BY MAIL

I am a citizen of the United States and a resident of the City and County of Los Angeles; I am over the age of eighteen years and not a party to the within action; my business address is: 9777 Wilshire Boulevard, Suite 600, Beverly Hills, California 90212.

On December 2, 1987, I served the within Brief In Opposition To Motion To Dismiss Appeal From State Court in re: "W. Kenneth Ross vs. the City of Rolling Hills" in the United States Supreme Court, October Term 1987, No. 87658;

On the Parties in said action, by placing Three copies thereof enclosed in a sealed envelope with postage fully prepaid, in the United States post office mail box at Beverly Hills, California, addressed as follows:

Richard R. Terzian
Adams Duque & Hazeltine
523 West Sixth Street
10th floor
Los Angeles, CA 90014

All parties required to be served have been served.

I declare under penalty of perjury, that the foregoing is true and correct.

Executed on December 2, 1987, at Beverly Hills, California.

Faith Ortega

FAITH ORTEGA